

*Privy Council Appeal No. 116 of 1929.*

*Bengal Appeal No. 18 of 1929.*

G. H. C. Ariff - - - - - *Appellant*

*v.*

Rai Jadunath Majumdar Bahadur - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 23RD JANUARY, 1931.

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*Present at the Hearing :*

LORD ATKIN.

LORD RUSSELL OF KILLOWEN.

SIR JOHN WALLIS.

[*Delivered by* LORD RUSSELL OF KILLOWEN.]

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By this suit the appellant sought to recover possession of a parcel of land from the respondent, upon an allegation that the respondent was a monthly tenant at will thereof, whose tenancy had been effectively determined before suit.

The action was tried in the Court of the Munsif of Sealdah. He found, in favour of the appellant, that a notice to quit had been duly served ; but he also found, in favour of the respondent upon other issues, that the respondent was a permanent tenant, and dismissed the suit. An appeal to the District Judge was dismissed.

The relevant facts as found in both these Courts may be shortly stated.

In 1913 a verbal agreement was made between the appellant and respondent, for the grant to the respondent by the appellant of a permanent lease of a small parcel of land at a total rent of Rs. 80 per month. In anticipation of the execution of the lease, the respondent was let into possession in June, 1913, and shortly

thereafter he erected certain structures on the land with the knowledge and approval of the appellant. At some time in the course of the year 1914 the parties seem to have agreed that the lease should be a lease for five years, renewable at the end of every period of five years. No lease was ever executed; but in October, 1922, the appellant served upon the respondent a notice to quit, asserting that he was a monthly tenant, and requiring the premises to be vacated by the 1st November, 1922. This not being done, the suit was instituted in the month of April, 1923.

An appeal was preferred to the High Court of Judicature at Fort William in Bengal, which remitted the case to the District Judge in order to obtain findings of fact on two points, viz. : (1) when the respondent had notice that performance of the verbal agreement of 1913 was refused by the appellant, and (2) whether the structures which the respondent erected on the land shortly after 1913, involved such an outlay of money as would reasonably strike the appellant as being an assertion of a permanent right in the land on the part of the respondent, or as would reasonably call for objection from a landlord who never intended to grant a permanent lease.

The District Judge duly returned his findings to the High Court, and found (1) that the respondent had in December, 1918, a definite refusal in clear terms on the part of the appellant, to perform the terms of the verbal agreement of 1913, that the present suit was not instituted within three years of that notice, and that the respondent's claim for specific performance was barred in view of Article 113 of Schedule I of the Limitation Act, and (2) that the respondent erected on the land a godown at a cost of between Rs. 10,000 and Rs. 12,000, that the appellant was aware that this building had been constructed, that he must have realised that the respondent would not have constructed the building on the land unless he was assured of the possession of a permanent right in it, and that if the appellant had not intended to grant a permanent lease of the land it might reasonably be expected that he would have objected to the construction of such a building.

The High Court then proceeded with the hearing of the appeal, and on the 18th January, 1923, made an order dismissing it with costs.

Before considering the grounds upon which the various Courts have refused relief to the appellant, it appears advisable to call attention to the fact that the appellant is the legal owner of the land; and as such he is entitled to possession thereof subject only to such right (if any) to enjoy it as may have been conferred upon the respondent by virtue of the verbal agreement, either alone or in conjunction with the other facts in the case.

Now it is clear that the verbal agreement alone could confer upon the respondent no such right. By Section 107 of the Transfer of Property Act, 1882, it is expressly enacted that "a

lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by registered instrument. All other leases of immovable property may be made either by an instrument or by oral agreement." This amounts to a statutory prohibition of the creation of such a right as is claimed here by the respondent, otherwise than by a registered instrument. No registered instrument exists, therefore, the respondent can have no such right as he claims unless he can establish it by some means operating independently and in violation of the statute.

The Courts in India held that he had established the right to enjoy the property as a permanent tenant upon grounds which their Lordships now proceed to examine.

The Munsif held that, by means of the equitable doctrine of part performance, the case was taken out of the provisions of the Transfer of Property Act, even if the respondent's right to sue for specific performance was barred. He held, however, that the respondent's right to sue was not barred and that his rights and liabilities were the same as they would have been if a lease had in fact been executed and registered. That, as their Lordships understand it, is the basis of his judgment; but he added a general statement, without entering into detail, that the appellant's claim was "barred by principles of waiver, estoppel and acquiescence."

The District Judge stated the question for decision as being, whether the equitable doctrine of part performance could override the provisions of the statutory law. He held that various decisions of the Courts in India had established that where there was a concluded agreement followed by part performance, the English equitable doctrine of part performance would apply even if the requirements of the Transfer of Property Act had not been fulfilled, and even if the right to sue for specific performance of the contract had become barred.

In the High Court the principal judgment was delivered by Mukerji, J. The other learned Judge (Graham, J.) agreed that the appeal failed, although the result would be the creation of a permanent lease without any registered instrument.

Mukerji J., in his judgment, starts with the proposition that the respondent, not having obtained a lease in the form of a registered instrument, could only resist ejectment if the case fell within some principle of equity.

He held that the case (being one in which an oral agreement and possession on the footing of it had been established) fell within what he calls the principle of *Maddison v. Alderson* (8 App. Cas. 467), by virtue of which "it must be held that the defendant is holding under a permanent lease which the plaintiff agreed to grant him and which equity will regard as having been so granted." He apparently realised that it might well be doubted, whether such a doctrine could be applied or could operate in cases where

statute law required the existence of a registered document as an essential for the creation of the title which the respondent claimed. In his opinion, however, the language used by this Board in two cases to which reference will be made hereafter, was wide enough to remove any such doubt. He held that, while the respondent had no valid title as lessee in the absence of a registered instrument, and had only such title as possession might confer, yet the appellant could not displace that possessory title by reason of the equities arising out of the executed contract.

The learned Judge then discussed "the doctrine enunciated in the cases of which *Walsh v. Lonsdale* (21 Ch.D. 9) is the type." This, he held, had no application to the present case, because the respondent's right to sue upon the verbal contract was barred.

Finally, he held that the case also fell well within what he called "the doctrine of equitable estoppel laid down in *Gregory v. Mighell* (18 Ves. 328), as explained in the case of *Ramsden v. Dyson* (L.R. 1 H.L. 129)." He quotes verbatim the two principles stated by Lord Kingsdown in *Ramsden v. Dyson*, and says that "the findings of the Court below, such as they are now, clearly bring the case within the first of the aforesaid two principles." The reference to the findings "as they are now" would seem to include particularly the detailed finding as to the character of the structures erected on the land.

Their Lordships cannot help feeling that some confusion of thought has prevailed in the Courts below in regard to the facts of this case, and the application of the authorities to those facts.

This is no case of money being expended by the respondent in any mistaken belief as to his legal rights, or of the appellant knowing of the existence of any such mistaken belief, or encouraging the respondent by abstaining from asserting a right inconsistent with the acts of the respondent. Observe the true facts. In 1913 the respondent obtained a verbal agreement for the grant of a perpetual lease, under which agreement he could have sued for and obtained and registered an instrument creating his title to enjoy the property in perpetuity. That agreement continued to be enforceable against the appellant until the month of December, 1921. The structures were erected on the land many years before that date, and they were erected not in any mistaken belief by the respondent of his rights in regard to the land, but in assertion of rights which he correctly believed to be his; not by reason of any encouragement or abstention on the part of the appellant, but by reason of the agreement which he was then entitled to enforce against the appellant.

In these circumstances, how can "the case of *Maddison v. Alderson*" assist the respondent? That case decided no new principle. It decided nothing except that upon the facts there proved, there was no part performance of a verbal contract sufficient to take the case out of Section 4 of the Statute of Frauds. It is only one of many cases which deals with the English equitable doctrine by which part performance of verbal contracts concerning

land, will dispense with the necessity of producing the memorandum of the terms of the contract signed by the party to be charged, which is required by Section 4 of the Statute of Frauds.

It is well settled that the Statute of Frauds only affects the right to sue on the contract. The contract subsists notwithstanding the absence of any signed memorandum. The Courts of equity in England, however, have decided that once the making of the contract has been established by the part performance of it, one of the parties to it shall not be permitted to use the Statute of Frauds as an instrument of fraud. These decisions have been described as "bold decisions on the words of the statute," and the doctrine as of a nature "not to be unwarrantably extended" (see *Brittain v. Rossiter*, 11 Q.B.D. 123, at pp. 129 and 133).

The basis of the doctrine of part performance has been stated in various ways. Cotton, L.J., in *Brittain v. Rossiter*, states it thus :—

"The true ground . . . is that if the Court found a man in occupation of land, or doing such acts with regard to it as would *prima facie* make him liable at law to an action of trespass, the Court would hold that there was strong evidence that a contract existed, and would therefore allow verbal evidence to be given to show the real circumstances under which possession was taken."

Any relief granted or protection afforded to the person in possession will be founded on the contract ; but the fact of part performance renders unnecessary the protection provided by the statute, in its requirement of a memorandum of the terms signed by the party to be charged. It was stated in *Maddison v. Alderson* that the equitable doctrine of part performance did not rest upon the view that equity will relieve against a public statute in cases which fall within it ; but, as Lord Selborne expressed it, the Statute of Frauds only contemplates the case of a person being charged upon the contract only ; it has not in view the case of a person being charged upon the contract, coupled with acts done in pursuance of the contract.

Whether an English equitable doctrine should in any case be applied so as to modify the effect of an Indian statute may well be doubted ; but that an English equitable doctrine affecting the provisions of an English statute relating to the right to sue upon a contract, should be applied by analogy to such a statute as the Transfer of Property Act and with such a result as to create without any writing an interest which the statute says can only be created by means of a registered instrument, appears to their Lordships, in the absence of some binding authority to that effect, to be impossible. Whether any such authority exists will be considered later.

Their Lordships find themselves in agreement with the High Court in the view that *Walsh v. Lonsdale* (21 C.D. 9) has no application to this case, owing to the fact that the respondent's right to enforce the verbal contract had been barred long before

the commencement of the present suit. The respondent was not in a position to obtain specific performance of the agreement for a lease from the same Court and at the same time as the relief claimed in this action. Had he been so entitled, the position would be very different, for then the respondent could claim to have executed in his favour by the appellant an instrument in writing which he could duly have registered, the appellant's ejectment action being stayed in the meantime. In these circumstances the respondent would obtain complete protection, but consistently with and not in violation of the provisions of the Indian statute.

There remains for consideration the other ground upon which the High Court based its decision, viz., that the case fell within the doctrine of equitable estoppel laid down in *Gregory v. Mighell*, as explained in the first principle stated by Lord Kingsdown in *Ramsden v. Dyson*. It appears to their Lordships that in this regard there has been some misapprehension. The relevant language of Lord Kingsdown is as follows :—

“ If a man under a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation, created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v. Mighell*, 18 Ves. 328, and, as I conceive it, is open to no doubt.”

It will be noticed that Lord Kingsdown is dealing with the case of express verbal contract or something “ which amounts to the same thing.” He nowhere puts the case of estoppel; the word is not mentioned. He would appear to be dealing simply with the equitable doctrine of part performance. His reference to *Gregory v. Mighell* confirms this view, for that case was simply an earlier instance of the application of the doctrine. In that case a bill for specific performance of a verbal agreement for the grant of a lease had been filed by a person in possession of the land. The Statute of Frauds was pleaded; but it was held that the possession being referable to the verbal agreement, there was part performance, and the Statute of Frauds affording in the circumstances no defence, specific performance was decreed. That is the whole decision in *Gregory v. Mighell*.

Reference is made by the learned Judge to the case of *Forbes v. Ralli* (52 I.A. 178) before this Board, but that decision was based upon an estoppel grounded upon a statement of fact. It was a case in which the plaintiff in ejectment was held estopped under Section 115 of the Indian Evidence Act, 1872, from denying that a certain registered written agreement was an agreement for a permanent tenancy. It is obviously no authority to assist the respondent here.

Even if Lord Kingsdown's language was intended to cover something beyond the equitable doctrine of part performance in relation to the Statute of Frauds, and was intended to refer to circumstances in which a Court of equity will enforce a title to land against the person who at law is the owner thereof, the title must, nevertheless, in their Lordships' view, be based either upon contract express or implied, or upon some statement of fact grounding an estoppel.

Their Lordships have already indicated their opinion that no act was done by the respondent otherwise than under the verbal contract which was then enforceable at his suit. No circumstances exist from which any other contract by the appellant can be implied; and as to estoppel there is no trace of any statement by him upon which any estoppel can be grounded.

In truth this case, when the true facts are appreciated, is simple enough. The acts of the respondent are all referable to a verbal contract, which was enforceable against the appellant at the time when the Respondent's expenditure was incurred, and for long afterwards. Unfortunately for the respondent, he allowed his right to enforce his contract to become barred, with the result that he can only resist the appellant's claim to possession by seeking to establish a title, the acquisition of which is forbidden by the statute. The statute disables him from contesting the appellant's right to possession.

Their Lordships think it unnecessary to discuss the numerous decisions of Courts in India which are referred to in the judgments and which were much discussed before the Board. They indicate conflicting views upon the questions which arise for decision here for the first time. It will, their Lordships think, be sufficient to consider the two cases before this Board in which, according to the High Court, language was used indicating that the respondent in the present case should be treated as a person having the rights which he would have enjoyed if the promised lease had been executed and registered. The cases referred to are *Mahomed Musa v. Aghore Kumar Ganguli* (42 Ind. App. 1) and *Malraju Lakshmi Venkayaamma v. Venkata Narasinha Appa Rao* (43 Ind. App. 138).

Neither of these cases, as a decision, affects the case now under consideration by the Board. The matter which was relied upon by the respondent consisted of certain *obiter dicta* in the course of which English doctrines of equity were described in terms of the law of Scotland and stated to be applicable in India.

In the former case the appeal was dismissed upon the grounds that a contract to convey had been made and that at the relevant date no written conveyance was required, the Transfer of Property Act, 1882, not having been passed.

In the latter case the decision rested entirely on the fact that a valid contract had been made and was enforceable by the appellant.

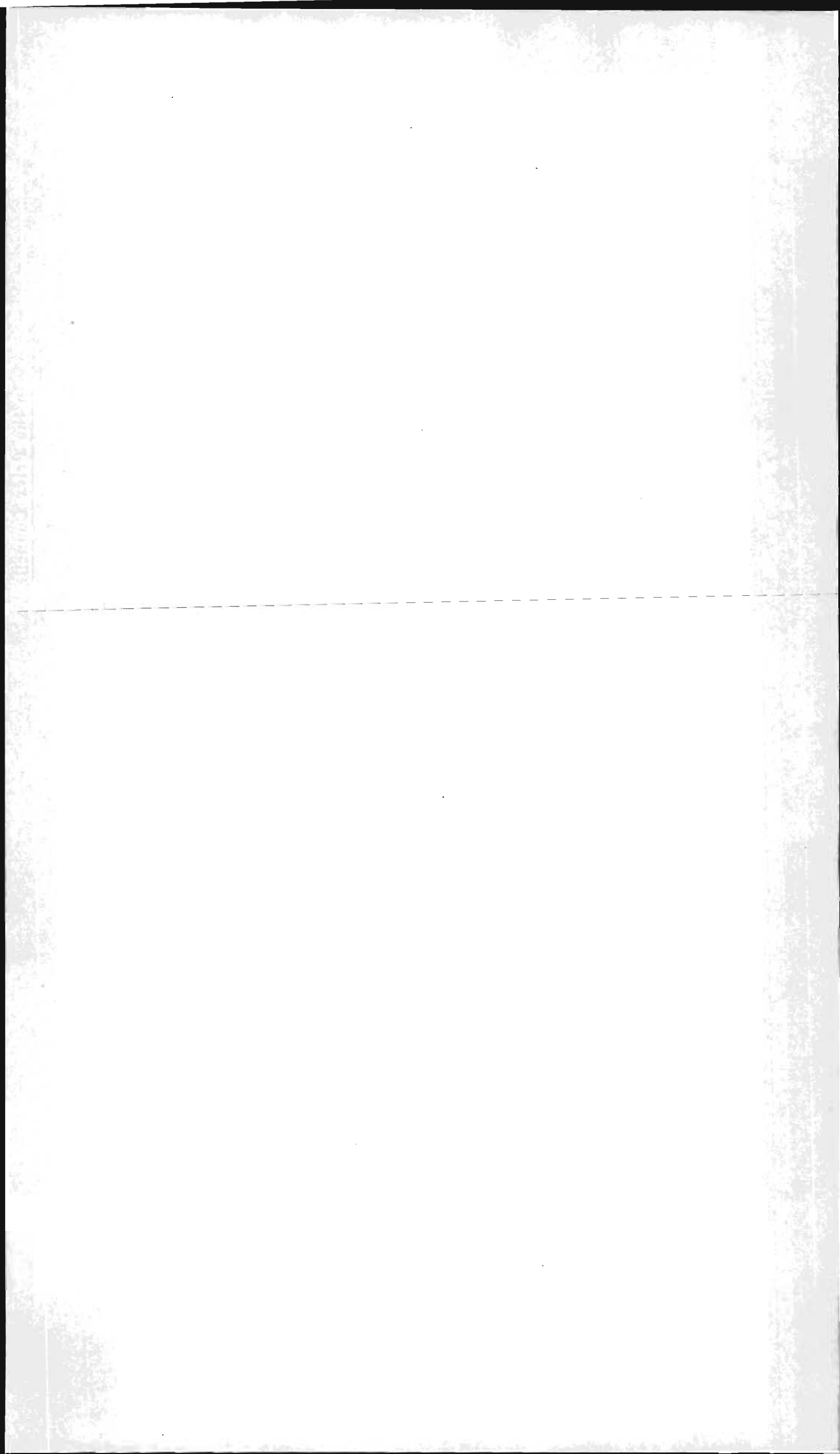
In each case, however, the judgment contains statements to the effect that even if the contract in question had been incomplete, the acts of the parties had been such that equity would in some way have bound the parties. Their Lordships do not understand these dicta to mean more than that equity may hold people bound by a contract which, though deficient, in some requirement as to form, is nevertheless an existing contract. Equity does this, as before stated, in the case of a verbal contract for the sale of land which has been partly performed. Their Lordships do not understand the dicta to mean that equity will hold people bound as if a contract existed, where no contract was in fact made ; nor do they understand them to mean that equity can override the provisions of a statute and (where no registered document exists and no registrable document can be procured) confer upon a person a right which the statute enacts shall be conferred only by a registered instrument.

In their Lordships' opinion, the doubt entertained by Mukerji J. whether the equitable doctrine which he thought was applicable, could operate so as to nullify the statutory requirement of a registered instrument, was justified.

Their Lordships cannot find that the facts of this case raise any equity in favour of the respondent. Even if any such equity was established, their Lordships are of opinion that it could not operate to nullify the provisions of the Indian Code relating to property and transfers of property.

For the reasons above given their Lordships are of opinion that this appeal should succeed. The decrees in the Courts below should be set aside and an order made for possession of the land in question. The case must be remitted to the Munsif to deal with the eighth issue on the footing of this judgment. The appellant does not claim that the structures should remain on the land ; the respondent must accordingly be at liberty to apply to the Court below either to fix a time within which he may enter and remove the structures, or to suspend the operation of the order for a sufficient time to enable him to effect such removal. The respondent must pay the appellant's costs in the courts below and of this appeal. Their Lordships will humbly advise His Majesty accordingly.





In the Privy Council.



G. H. C. ARIFF

2.

RAI JADUNATH MAJUMDAR BAHADUR.



DELIVERED BY LORD RUSSELL OF KILLOWEN.

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